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**BEFORE THE BOARD OF OIL, GAS & MINING**
**DEPARTMENT OF NATURAL RESOURCES**
**STATE OF UTAH**

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| UTAH CHAPTER OF THE SIERRA CLUB, et al,<br><br>Petitioners,<br><br>v.<br><br>UTAH DIVISION OF OIL, GAS & MINING,<br><br>Respondent,<br><br>ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH,<br><br>Respondent/Intervenors. | **UTAH DIVISION OF OIL, GAS & MINING'S RESPONSE TO ALTON COAL DEVELOPMENT LLC'S MOTION FOR DISCOVERY AND TO PETITIONERS' RESPONSE**<br><br>Docket No. 2009-019<br><br>Cause No. C/025/005 |

The Utah Division of Oil, Gas, and Mining (Division), by and through its undersigned counsel, hereby submits its Response to Alton Coal Development LLC's (Alton) Motion for Discovery and to Petitioners' Response. This Response is filed pursuant to the parties stipulation filed with the Board on November 14, 2013. *See* Stipulation Regarding Briefing Schedule—Motion for Leave to Conduct Discovery—Award of Fees and Costs, at 2.

## FACTS

The pertinent facts related to attorney's fees in this case are as follows:

**Phase 1**

1. On November 18, 2009, the Utah Chapter of the Sierra Club et al. ("Sierra Club") filed an action before the Utah Board of Oil, Gas and Mining ("Board"), challenging the Division's approval of Alton's application to conduct surface coal mining at Coal Hollow.

2. On November 23, 2009, Alton was allowed to intervene in the case.

3. On November 22, 2010, after months of briefing and several hearings, the Board confirmed the Division's decision granting the Coal Hollow Mine Permit No. C/025/0005 to Alton. Sierra Club ultimately appealed that decision to the Utah Supreme Court.

4. On December 21, 2010, Sierra Club filed a petition asking the Board to enter an order requiring the Division to pay attorney's fees to Sierra Club since Sierra Club had allegedly prevailed on at least one of its claims against the Division (protection of cultural and historic resources).

5. On March 7, 2011, the Board stayed any further consideration of attorney's fees until final resolution of the appeal to the Utah Supreme Court.

6. On October 30, 2012, the Utah Supreme Court issued its decision in Appeal No. 20100969-SC, affirming the Board's and Division's approval of the Coal Hollow Mine Permit No. C/025/0005.

**Phase 2**

7. On November 19, 2012, Alton asked for the stay on attorney's fees to be lifted, and for permission to file a fee petition of its own. The Board granted that request on December 5, 2012,

pursuant to a stipulation between the parties dated December 4, 2012, which, among other things, postponed consideration of Sierra Club's claim for attorney's fees for protection of cultural and historical resources until "after February 27, 2013, if necessary." Stipulation Regarding Motion to Lift Stay of Consideration of Fee Awards, Request for Leave to File Fee Petition and Briefing Schedule at 3, ¶ 3, December 4, 2012 ("Consideration of Petitioners' pending fee petition dated December 21, 2010, will be scheduled for briefing and hearing after February 27, 2013, if necessary.").

8. On January 10, 2013, before filing an actual fee petition, Alton filed its "Opening Brief on the Legal Standard Governing Fee Petitions" ("Opening Brief"). This filing was made pursuant to an agreement among the parties to present arguments to the Board regarding the appropriate legal standard to apply before asking the Board to award fees. In its Opening Brief, Alton argued it would be entitled to recover attorney's fees from Sierra Club based on the statutory language of Utah Code 40-10-22(3)(e) if it could show simply that a final order had been entered and that a request had been made for attorney's fees. *See* Opening Brief at 5. Alton noted it had not only achieved "some degree of success on the merits," but had been "wholly successful" on the merits, and was therefore entitled to file a petition for attorney's fees as the "prevailing party" under *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). *See* Opening Brief at 5.

9. In its Response to Alton's Opening Brief, Sierra Club argued that the Board's rules as originally adopted included a provision called Rule B-15 which governed attorney's fees awards and required the Board to apply a "bad faith" standard to Alton's claim. Specifically, Sierra Club argued that Rule B-15 required Alton to show Sierra Club "initiated a proceeding . . . or

participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee." *See* Response Brief of Petitioners Utah Chapter of Sierra Club et al. to Alton Coal Development, LLC's Opening Brief on the Legal Standard Governing Fee Petitions, at 6, February 11, 2013 (showing that the language of Rule B-15 mirrored that of 43 C.F.R. § 4.1294(e)).

10. Prior to filing its Response on February 19, 2013, the Division determined that the rules governing the award of attorney's fees that had been adopted as a condition to the approval of the Utah Coal Program in 1981 (i.e., Rule B-15) had been omitted from the published rules. After an investigation into the history of the change, the Division determined that the omission of Rule B-15 was the result of an inadvertent error and that the Utah Coal Program as approved by OSM must still include Rule B-15. *See generally* Division's Memorandum Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees.

11. On March 27, 2013, the Board ruled against Alton, finding that the "bad faith" standard embodied in Rule B-15 *did* apply, and in order to be awarded attorney's fees, Alton would have to show that Sierra Club challenged the permit for the purpose of harassing or embarrassing Alton. Alton asked the Board to reconsider its decision, which the Board did. On September 16, 2013, after reconsideration, the Board issued an order affirming its prior decision that the "bad faith" standard embodied in Rule B-15 *did* apply.

12. On October 15, 2013, after recognizing that Rule B-15 governed the issue of attorney's fees in this case, but prior to filing an actual petition for fees, Alton filed a "Motion for Leave to Conduct Discovery—Award of Fees and Costs" (hereinafter "Alton's Motion for Discovery"). In its accompanying Memorandum, Alton argued that it was necessary to engage in discovery

before filing a petition because it was necessary to determine whether Sierra Club filed the permit challenge for the purpose of harassing or embarrassing Alton. *See* Alton Coal Development, LLC's Memorandum in Support of Motion for Leave to Conduct Discovery–Award of Fees and Costs, at 2.

13. On November 22, 2013, Sierra Club filed its "Response to Alton Coal Development's Motion for Leave to Conduct Discovery—Award of Fees and Costs" ("Sierra Club Response"). Sierra Club argued, among other things, that discovery was not necessary in this case because the Board could decide the attorney's fees question on the existing record, *see* Sierra Club Response at 6, and that Alton had not made any allegations that would give rise to a need for discovery, *see id.* at 10 (" . . . Alton has made no allegations . . . that Petitioners acted in bad faith for the purpose of harassing or embarrassing Alton."). Sierra Club also argued, among other things, that the proposed discovery would impose undue burden on Sierra Club and the Board. *See id.* at 14, 22.

14. On December 20, 2013, Alton filed its Reply Memorandum in Support of Motion for Discovery, arguing that the appropriate standard for determining whether to authorize discovery was "good cause," *see* Utah Admin. Code R641-108-900, and it has good cause to engage in discovery because it could not have acquired information regarding Sierra Club's motives before this phase of the litigation. *See* Alton Coal Development, LLC's Reply Memorandum in Support of Motion for Discovery, at 4.

**ARGUMENT**

The Division files this Response to clarify the Division's position on Alton's Motion for Discovery, filed on October 15, 2013. The Division emphasizes that it is not filing this Response

as a party with any interest in this dispute over fees, but rather as an entity with shared duties to administer the Utah Coal Program as delegated to the State. *See* Utah Code § 40-10-2(1). By filing this Response, the Division does not inject itself into the private parties' dispute; rather, the Division is simply upholding its obligation to further the purposes of the Utah Coal Program by setting forth what it believes to be the appropriate standard governing fees and discovery in this case.

## I. Alton's Motion for Discovery is Premature

Alton's Motion for Discovery is premature since Alton has not filed a petition for fees as required by Rule B-15 and as contemplated by the parties' Stipulation dated December 4, 2012. *See* Stipulation Regarding Motion to Lift Stay of Consideration of Fee Awards, Request for Leave to File Fee Petition and Briefing Schedule, filed December 5, 2012, at 3 ("ACD will file any petition for fees after the Board rules on the standard of review.") At this time, Alton has not filed a petition for fees as required by the rule determined applicable to the claim—Rule B-15. Admittedly, some of the information required to be included in the petition may need to be supplemented, but the Board should require that such a petition be filed to assure the petition is timely, that it sets forth the names of the person against whom costs and expenses are sought, and that it sets forth the costs and expenses incurred and claimed. *See* Rule B-15 (requiring petition to be filed with the Board within 45 days of a final order and to contain the "name of the person from whom costs and expenses are sought" and other information forming the basis of the requested fees and costs). After such a petition is filed, the person(s) from whom costs and expenses are sought may file an answer. *See* Rule B-15 ("Any person served with a copy of the petition shall have 30 days from service of the petition within which to file an answer to such

petition."). This initial set of pleadings will assist the Board in determining the basis for the claims, and in evaluating the limits of subsequent discovery for those claims if discovery is determined to be appropriate. It is mandatory that the procedural requirements of the rule be followed.

## II. Once a Proper Petition for Fees has been Filed, the Board Should Employ the "Good Cause" Standard Found in Utah Admin. Code R641-108-900 to Determine Whether to Allow Discovery Into the Attorney's Fees Claim

The beginning point for determining whether the Board should permit discovery is the Utah Administrative Procedures Act. Under UAPA, an agency may, in formal adjudicative proceedings, "prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses." Utah Code § 63G-4-205(1). "If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure." *Id.* Thus, it is first necessary to determine whether the Division has enacted rules under UAPA relating to discovery.

Utah Admin. Code R641-108-900 provides: "Upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery against another party, including the Division or the Staff, as may be prescribed by and in the manner provided by the Utah Rules of Civil Procedure." Thus, the Division has enacted a rule relating to discovery and, according to this rule, the Board may authorize discovery if (1) a motion is filed requesting discovery and (2) there is "good cause" for authorizing discovery. Discovery should proceed "by and in the manner provided by the Utah Rules of Civil Procedure." *Id.*

While Alton has filed a motion for discovery, it has not yet filed a petition for fees. It is presumed that such a petition will be filed in the near future. Prior to such a petition being filed,

however, it would be premature for the Board to address a motion for discovery. *See* Rule B-15 (requiring petition to be filed). Presuming a proper petition and answer are filed, the next question would be whether the second element of R641-108-900 is met; that is, whether "good cause" exists to allow the parties to engage in discovery for an attorney's fees claim.

The precise definition of "good cause" as used in this particular rule has not yet been developed, but civil litigation cases provide insight as to when a party has "good cause" to pursue discovery. *See Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254, 1255 (Utah 1972) ("There is no settled understanding of what 'good cause' means; since the determination depends to a large extent upon the facts of each case, a wide latitude of discretion is necessarily vested in the trial judge [or the Board]."); *Ekshteyn v. Dep't of Workforce Svcs.*, 45 P.3d 173, 176, n.3 (Utah App. 2002) ("Utah case law is silent on what 'good cause' means, and it appears . . . that this particular issue has not been addressed in other jurisdictions."); *see also Road Runner Oil, Inc. v. Board of Oil, Gas and Mining*, 76 P.3d 692, 696 (Utah App. 2003) (quoting *Jackson*, discussing "good cause" in the context of the Division of Oil, Gas and Mining's oil and gas administrative rule governing shut-in wells). These cases demonstrate that the decision maker—here, the Board—has wide discretion in determining whether there is good cause to permit discovery.

In exercising that discretion, Utah Admin. Code R641-108-900 provides that the Board should use the guidance of the Utah Rules of Civil Procedure to decide whether "good cause" exists. *See id.* ("[T]he Board may authorize such manner of discovery . . . as may be prescribed by an in the manner provided by the Utah Rules of Civil Procedure."). Thus, it is instructive to turn to the Utah Rules of Civil Procedure for direction.

Rule 26(b)(1) of the Utah Rules of Civil Procedure provides that "[p]arties may discover any matter, not privileged, which is relevant to the claim or defense of any party *if the discovery satisfies the standards of proportionality* set forth below. . . . " Utah R. Civ. P. 26(b)(1) (emphasis added). Discovery and discovery requests are "proportional" if:

> (b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
> (b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;
> (b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination or the case;
> (b)(2)(D) the discovery is not unreasonably cumulative or duplicative;
> (b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and
> (b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

Utah R. Civ. P. 26(b)(2). The party seeking discovery "always has the burden of showing proportionality and relevance." Utah R. Civ. P. 26(b)(3).

In this case, Sierra Club argues that no further discovery is necessary because the issues can be decided on the existing record. On the other hand, Alton argues that extensive discovery is necessary in order to uncover information that will support its claim. The Division believes that the line falls somewhere in between.

Considering that the existing record was developed *before* the Board announced its decision that the "bad faith" standard for attorney's fees applied, there has been no reason for Alton to seek evidence of bad faith since it did not know if there would be a basis for claiming fees. *See* Utah R. Civ. P. 26(b)(2)(F) ("the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise"). Thus, it would be difficult for

the Board to decide bad faith on the existing record and "good cause" likely exists for at least some degree of discovery in this case.

However, in light of the foregoing standards of proportionality, the Division believes discovery should be permitted only to the extent the factors set forth in Utah R. Civ. P. 26(b)(2) are satisfied. The Board should exercise its discretion to limit discovery to information that is not unreasonably cumulative or duplicative, would contribute to the just, speedy, and inexpensive determination of the case, and that would benefit more than burden the case. *See id.* Thus, the Board should require Alton to file a petition for fees setting forth the basis for those fees and, if warranted, enter an order authorizing Alton to conduct limited discovery based on the factors outlined in Utah R. Civ. P. 26(b)(2).

## III. If the Board Decides that Discovery is Warranted, Attorney's Fees Should Be Awarded Only if There is No Basis in Fact or Law for the Allegations Made or If They Were Brought to Harass or Embarrass the Permittee

Rule B-15 allows a permittee to recover attorney's fees "where the permittee demonstrates that the person initiated a proceeding . . . . in bad faith for the purpose of harassing or embarrassing the permittee." Presuming Alton files a petition for fees under this rule and the Board determines that discovery is authorized on a limited basis, the Board could then use the information gathered during discovery to determine whether it would be appropriate to award attorney's fees. In making that determination, the Board would need to decide whether there were factual and legal bases for the allegations asserted by Sierra Club in the RAA. *See Lucchino v. Commonwealth of Pennsylvania*, 744 A.2d 352 (Pa. Commw. Ct. 2000), *aff'd* 809 A.2d 264 (discussing "bad faith" in the context of a SMCRA attorney's fees claim by a permittee against a citizen).

In deciding this question, the Board should recognize that the provisions in the Utah Coal Act (the "Act") and the applicable rules seek to accommodate and promote public participation. Utah Code §40-10-2(4). The Board has acknowledged this goal in its ruling that the "bad faith" standard applies. Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions at 10, filed September 16, 2013 ("[T]he Board exercises its discretion to apply the bad faith standard in this matter because that standard furthers the statutory purpose of encouraging 'public participation in the development, revision, and enforcement of rules, standards, reclamations, or programs established by the state under this chapter . . . .'" (quoting Utah Code § 40-10-2(4))). If discovery is burdensome and intrusive it will prevent or discourage public participation, which would be contrary to the purposes of the Act. On the other hand, one of the purposes of the Act is also to foster responsible mining of coal and does not encourage public participation that is brought to harass, annoy or embarrass a permittee. The difficulty presented by Alton's Motion for Discovery is how to balance the purposes of the Act in determining Sierra Club's motive for challenging the initial permit without creating a chilling effect on the public's right to question and challenge permit decisions.

Certainly, the parties disagree over the appropriateness of the coal mine and whether a permit should have been issued. And there may be evidence that the Petitioners or some of Petitioners' board members sought to file the action with the desire to stop the mine. However, this does not necessarily mean that Sierra Club's RAA challenging the permit decision was filed "in bad faith for the purpose of harassing or embarrassing the permittee." Rule B-15. The

applicable standard requires that the claims are frivolous, lacking any basis in law or fact and that they were brought for the purpose of harassing or embarrassing the permittee.[1]

Rule 11 of the Utah Rules of Civil Procedure provides the likely starting point for the Board's analysis. Rule 11 requires the party filing a pleading to certify to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances, that it is not being presented for any improper purpose (such as to harass, or cause unnecessary delay, or needlessly increase the cost of litigation), that the claims and defenses are warranted by existing law or by non-frivolous argument for the extension of the law or establishment of new law, and that the evidentiary allegations and factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for investigation or discovery. *See* Utah R. Civ. P. 11. Thus, under Rule 11, determining if a claim is filed in bad faith should appropriately include an inquiry into whether there are factual and legal bases for the claims asserted. Here, if there are factual and legal bases for the claims asserted by Sierra Club, there is no bad faith. Likewise, if it can be shown that Sierra Club's purpose in bringing the RAA was not to embarrass or harass, there is no bad faith.

In summary, Alton should first file a petition for fees stating which of Sierra Club's allegations it believes were made in bad faith and the amount it seeks in attorney's fees. Sierra Club should be required to answer the petition within 30 days. This is consistent with the procedure envisioned by Rule B-15, and will assist the Board in determining "good cause." If the Board determines good cause exists for discovery, the parties should be allowed to engage in limited discovery based upon the directives embodied in Rule 26. After such discovery, the

[1] For further guidance on what constitutes "bad faith" in the context of a SMCRA attorney's fees claim by a permittee against a citizen, *see Lucchino*, 744 A.2d 352; *aff'd* 809 A.2d 264.

Board will be in a position to determine whether Sierra Club lodged its challenge to the permit "in bad faith for the purpose of harassing or embarrassing the permittee" and whether to award attorney's fees. On the other hand, opening the door of discovery at this point, without a petition filed and without an explanation as to limitations on discovery, could lead to the use of discovery in a manner that would be contrary to the public participation goals of the Act and contrary to the proportionality concepts woven into Utah R. Civ. P. 26.

## IV. The Current Fees Dispute is a Dispute Between Private Parties and Does Not Involve the Division

In addition to the foregoing arguments, the Division alleges that the current fees dispute is between private parties and does not involve the Division. The Division is not responsible for fees incurred in disputes between private parties. Therefore, unless there is a petition filed against the Division, the Division should not be involved in the arguments for and against an award of fees.[2] This is because "[t]he government should not be held liable for fees incurred in a dispute between private parties." *Utah International v. Department of the Interior*, 643 F.Supp. 810, 819, n.15 (D.Utah 1986) (applying SMCRA and citing *Natural Resources Defense v. EPA*, 595 F.Supp. 65, 70, n.1 (D.D.C. 1984)).

Under the current Motion, Alton seeks discovery for a forthcoming petition for fees. In that forthcoming petition, Alton will seek fees from *Sierra Club*, not the Division. Similarly, with the exception of Sierra Club's petition for attorney's fees filed against the Division in December 2010, resolution of which has been postponed until after February 27, 2013, *see* Stipulation Regarding Motion to Lift Stay of Consideration of Fee Awards, Request for Leave to

[2] As noted herein, Sierra Club previously filed a petition for fees against the Division for failure to adequately protect cultural and historical resources. Consideration of that petition has been stayed until after February 27, 2013. This Response does not address that petition.

File Fee Petition and Briefing Schedule at 3, ¶ 3 ("Consideration of Petitioners' pending fee petition dated December 21, 2010, will be scheduled for briefing and hearing after February 27, 2013, if necessary."), Sierra Club has not asserted that the Division should pay attorney's fees to Sierra Club.[3] After the Supreme Court's ruling, the Division has not been named as a potentially liable party by any person seeking attorney's fees. Thus, the dispute is purely between private parties and the Board should clarify that the Division is not liable for attorney's fees incurred by Alton or Sierra Club in this phase of the litigation.[4]

## CONCLUSION

For the foregoing reasons, the Board should enter an order in this case requiring that prior to determining the extent of discovery permitted, Alton file a petition for fees as required by Rule B-15 and that Sierra Club file an answer. The Board should require that the petition and answer specifically address the allegations in the initial permit challenge that were made in bad faith or with the purpose of harassing or embarrassing the permittee. The Board should then,

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[3] To be sure, the Division's potential liability is limited to Sierra Club's claim in the phase of this litigation that ended when the Utah Supreme Court ruled in the Division's favor (Phase 1). *See West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239 (4th Cir. 2003) (explaining eligibility requirement, i.e. that in order to be eligible for attorney's fees, a petitioner must achieve at least some degree of success on the merits); *see also West Virginia Highlands Conservancy v. Kempthorne*, 569 F.3d 147 (4th Cir. 2009) (explaining eligibility requirement). Since Sierra Club did not achieve even partial success on the merits during Phase 1, Sierra Club should not be able to recover attorney's fees from the Division for Phase 1, and should not be able to recover attorney's fees from the Division for a claim raised, litigated, and perpetuated by Alton during Phase 2.

[4] The only argument either party could make to justify the collection of fees incurred during this phase of the litigation against the Division is that it failed to carry out its statutory duties to uphold the purposes of the Utah Coal Program by failing to support appropriate standards to be applied for collection of attorney's fees or the allowance of discovery. *See West Virginia Highlands Conservancy*, 343 F.3d 239, 247 (4th Cir. 2003) (holding that a "remand order that required OSM to restart the informal review process . . . amounted to partial success [because it] required OSM to do a proper job in carrying out one of its duties under SMCRA"). However, that argument is not available to either party in this case because the Division has carried out its statutory duty to uphold the purposes of the Utah Coal Program by setting forth the standards it believes are appropriate for collection of attorney's fees and the allowance of discovery. *See* Division's Memorandum Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees (filed Feb. 19, 2013) (arguing applicable standard for recovery of attorney fees); *see also* Section II, *supra* (arguing applicable standard for allowing discovery). Accordingly, the Board should enter an order declaring the Division is not liable for attorney's fees incurred by the private parties engaged in this phase of the dispute.

after review of the petition and answer, determine whether there is "good cause" for further discovery into the basis for those allegations and, if discovery is appropriate, limit discovery according to the proportionality standards found in Utah R. Civ. P. 26(b). In deciding whether there was bad faith in filing the RAA, the Board should be guided by the general pleading requirements set forth in Utah R. Civ. P. 11.

Finally, because the Division is not a party to the current attorney's fees dispute, the Board should enter an order declaring that the Division is not responsible for fees incurred by the parties during this phase of the litigation.

SUBMITTED this 2 day of January, 2014.

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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing **RESPONSE TO ALTON COAL DEVELOPMENT LLC'S MOTION FOR DISCOVERY AND TO PETITIONERS' RESPONSE** was delivered to the following persons at the addresses shown, this 2nd day of January, 2014.

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